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Ogujiofor Frank Chike v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–106–04 OF 2012
LINTON ALBERT, MAH WENG KWAI AND ABANG ISKANDAR JJCA
12 JUNE 2014

C

Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking — Trafficking in 1,463g methamphetamine — Appeal against conviction and sentence — Drugs found hidden inside lining at the sides of appellant's bag at KLIA — Appellant looking shocked and perspiring during inspection — Appellant claiming to be under impression that he was smuggling precious stones for someone else — Appellant's explanation of his shocked appearance inconsistent with innocence — Whether appellant was in possession of drugs with view to traffic — Determining possession — Whether presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 properly invoked

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The appellant was stopped by customs officers at the KLIA in Sepang for inspection of his bags. Upon inspection, methamphetamines were found hidden inside the lining at the sides of the appellant's bag. The appellant looked shocked and was perspiring during the inspection. The appellant was thus arrested and charged with an offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant claimed that he was under the impression that he was smuggling diamonds and precious stones upon the behest of one by the name of 'Ifeanyi' in his native country, Nigeria. The appellant averred that he had no knowledge of the drugs and maintained that he was merely an innocent carrier. The learned trial judge ('the judge') convicted the appellant and sentenced him to death. The appellant appealed against the conviction and sentence. The appellant claimed that his shocked expression was because he thought that he was smuggling diamonds. It was thus contended that s 9 of the Evidence Act 1950 ('the Act') requires only an explanation from the appellant and it would then be up to the prosecution to rebut the same by calling witnesses and failing which, an adverse inference under s 114(g) of the Act must be invoked against the prosecution. It was also contended that it was not safe to convict based on circumstantial evidence.

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Held, dismissing the appeal and affirming the conviction and sentence:

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(1) In a charge for drug trafficking, the two essential ingredients which the prosecution must establish on a prima facie level are first that the accused person had possession of the impugned substances, and that second the accused was in such possession with a view to traffic the same within the

meaning as contemplated by the DDA. Possession arises from the accused having either custody or control over the impugned drugs. Depending on the circumstances surrounding the factum of control or custody, possession may be established by way of affirmative evidence or, it may be presumed under s 37(d) of the DDA (see para 12).

(2) In the context of s 37(d) of the DDA, once a person is shown from the evidence adduced by the prosecution, to be in custody or control of the drugs, the two things are presumed against him. First, is that he is presumed to be in possession of the said drugs, and second, he is deemed to know the nature of such drug. Once the presumption of possession is invoked against the accused person, he has the burden of rebutting it on the balance of probabilities (see para 13).

(3) The appellant was caught in possession of the bag containing methamphetamine weighing 1,463g, wrapped in aluminum foils hidden behind layers of linings inside the said bag. The prosecution had established a prima facie case against the appellant on the charge of trafficking in the said drugs. The evidence surrounding the finding of the impugned drugs from inside the bag over which the appellant had control or custody had justified the judge's invocation of the presumption of possession under s 37(d) of the DDA against the appellant. The appellant had the key to unlock the said bag (see paras 16–17 & 22).

(4) The judge had invoked the presumption of possession and did not invoke the presumption of trafficking against the appellant despite the amount of the drugs having exceeded the statutory threshold amount (see para 25).

(5) Granted that the appellant had given an explanation for his conduct, it did not mean that the trial court must of necessity accept whatever explanation that the appellant has proffered. The court will have to consider the explanation given, in the light of the other available evidence before deciding whether to accept or reject that explanation. The appellant's conduct at the material time was not consistent with one that was indicative or reflective of one's innocence. Further, the appellant had been inconsistent on a material fact as regards the contents of his bag when at one point during inspection of the bag at the KLIA, he said the bag had contained only his clothes and shoes while at another time, he told the court that he knew he had carried diamonds inside the said bag (see paras 44 & 47).

[Bahasa Malaysia summary

Perayu telah ditahan oleh pegawai kastam di KLIA di Sepang untuk pemeriksaan begnya. Selepas pemeriksaan, methamphetamine ditemui tersembunyi di dalam lapisan di sisi beg perayu. Perayu kelihatan terkejut dan berpeluh semasa pemeriksaan. Perayu dengan itu ditahan dan didakwa atas

kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Perayu mendakwa bahawa dia adalah di bawah tanggapan bahawa dia telah menyeludup berlian dan batu berharga menurut arahan seorang bernama 'Ifeanyi' di negara asalnya, Nigeria. Perayu menegaskan bahawa dia tidak mempunyai pengetahuan tentang dadah dan menegaskan bahawa dia adalah semata-mata pembawa tidak bersalah. Hakim perbicaraan yang bijaksana ('hakim') menyabitkan perayu dan menjatuhkan hukuman mati. Perayu membuat rayuan terhadap sabitan dan hukuman. Perayu mendakwa bahawa perasaan terkejutnya kerana dia berfikir bahawa dia telah menyeludup berlian. Dengan itu dia berhujah bahawa s 9 Akta Keterangan 1950 ('Akta') hanya memerlukan penjelasan daripada perayu dan ia kemudiannya terletak kepada pihak pendakwaan untuk membantahnya dengan memanggil saksi dan sekiranya gagal berbuat demikian, suatu inferens bertentangan di bawah s 114(g) Akta hendaklah digunakan terhadap pihak pendakwaan. Ia juga dihujahkan bahawa adalah tidak selamat untuk mensabitkan berdasarkan keterangan mengikut keadaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Dalam suatu pertuduhan bagi pengedaran dadah, dua bahan penting yang perlu dibuktikan oleh pihak pendakwaan di peringkat prima facie adalah seorang tertuduh mempunyai milikan terhadap bahan tersebut, dan keduanya tertuduh adalah dalam milikan sedemikian dengan tujuan untuk mengedarnya mengikut pengertian seperti yang ditetapkan oleh ABD. Milikan timbul daripada tertuduh sama ada tertuduh atau mempunyai jagaan kawalan ke atas dadah diragukan. Bergantung kepada keadaan sekitar faktum kawalan atau jagaan, pemilikan boleh dibuktikan melalui keterangan afirmatif atau, ia boleh dianggap di bawah s 37(d) ABD (lihat perenggan 12).

(2) Dalam konteks s 37(d) ABD 1952, apabila seseorang itu ditunjukkan dari keterangan yang dikemukakan oleh pihak pendakwaan, berada dalam jagaan atau kawalan ke atas dadah, dua perkara yang dianggap terhadapnya. Pertama, adalah bahawa dia dianggap mempunyai milikan terhadap dadah tersebut, dan kedua, dia dianggap mengetahui sifat dadah itu. Apabila anggapan pemilikan digunakan terhadap orang yang dituduh, dia mempunyai beban untuk mematahkan imbangan kebarangkalian (lihat perenggan 13).

(3) Perayu telah ditangkap dalam milikan beg yang mengandungi methamphetamine seberat 1,463g, dibungkus dalam kerajang aluminium tersembunyi di sebalik lapisan lapik di dalam beg tersebut. Pihak pendakwaan berjaya membuktikan kes prima facie terhadap perayu atas tuduhan mengedar dadah tersebut. Keterangan menyelubungi dapatan terhadap dadah daripada dalam beg yang mana perayu mempunyai kawalan atau jagaan telah mewajarkan penggunaan

hakim terhadap anggapan milikan di bawah s 37(d) ADB terhadap perayu. Perayu mempunyai kunci untuk membuka beg tersebut (lihat perenggan 16–17 & 22).

(4) Hakim telah menggunakan anggapan milikan dan tidak menggunakan anggapan pengedaran terhadap perayu walaupun jumlah dadah melebihi jumlah ambang statutori (lihat perenggan 25).

(5) Dengan penjelasan yang diberikan oleh perayu untuk kelakuannya, ia tidak bermakna bahawa adalah kemestian untuk mahkamah perbicaraan menerima apa juga penjelasan bahawa perayu telah berikan. Mahkamah perlu mengambil kira penjelasan yang diberikan, berdasarkan keterangan lain yang ada sebelum membuat keputusan sama ada untuk menerima atau menolak penjelasan itu. Kelakuan perayu pada masa tersebut tidak selaras dengan sesuatu yang menunjukkan atau menggambarkan seseorang tidak bersalah. Seterusnya, perayu telah tidak konsisten pada fakta penting berkenaan dengan kandungan begnya apabila pada satu ketika semasa pemeriksaan beg itu di KLIA, dia mengatakan beg itu hanya mengandungi pakaian dan kasutnya dan pada masa yang lain, dia memberitahu mahkamah bahawa dia tahu dia telah membawa berlian di dalam beg tersebut (lihat perenggan 44 & 47).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (folld)
Emperor v Karimuddi Sheikh And Ors AIR 1932 Cal 375, HC (refd)
Mirza Murtala v PP [2010] 5 MLJ 616; [2010] 4 CLJ 150, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (folld)
PP v Dato' Seri Anwar bin Ibrahim [No 3] [1999] 2 MLJ 1, HC (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146, HC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604, FC (refd)
Tong Peng Hong v PP [1955] 1 MLJ 232 (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), 39B(2), First Schedule
Evidence Act 1950 ss 8, 9, 114(g)

Vicknesvaran a/l Kanapathipillai (Viknes Ratna & Co) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

[1] This has been an appeal by the accused person, Ogujiyofor Frank Chike ('the appellant'), against the conviction that was entered against him, on a charge of drug trafficking (P1), an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952'). He was also appealing against the sentence of death that was imposed against him as a result thereof by the learned trial High Court judge pursuant to s 39B(2) of the same DDA 1952.

[2] The brief facts can be stated as follows; on 26 August 2010, Senior Royal Customs and Excise Officer Elangovan a/l Rethnasamy ('PW4'), was on supervisory duty at the Cawangan Pemeriksaan Penumpang Unit of the Malaysian Royal Customs and Excise at the KLIA in Sepang. At about 3.10pm he saw the appellant walking through the Green Lane A. He stopped the appellant with the assistance of customs officer Zamri and instructed the appellant to put his brown luggage bag (P19) that he was lugging and a hand-carry bag (P20) that he was carrying. These items were then, put through the scanner machine, which was then manned by customs officer Fahmi.

[3] PW4 testified that he had noticed a suspicious image in the bag P19 on the monitor of the scanning machine. The image appeared on the left side wall and right side wall in the inside of the said luggage bag P19. The appellant was then asked to put the luggage bag P19 on the examination counter. PW4 next asked for the appellant's passport (P21) and compared the name in the passport held by the appellant with the name appearing on the luggage tag (P19)(1) tied to the handle of the said luggage bag P19. He found the name on P19(1) to bear the appellant's name as in his passport (P21).

[4] Then PW4 instructed the appellant to open the luggage P19. The luggage bag P19 was fitted with a lock (P22). The appellant then took a key (P22A) from a bunch of three keys and unlocked the lock. Thereafter PW4 asked the appellant to remove all the clothing from inside the bag P19. He then groped (PW4 used the words 'raba' in Bahasa Melayu) the left wall and right wall inside of the bag P19. He felt like there were things hidden there.

[5] The appellant was then asked to repack his clothing into the said luggage bag P19. He was later taken to CPP's office together with the luggage P19 and the hand-carry bag, P20. There, PW4 called and waited for the arrival of the investigating officer ('the IO') of the case before taking further action.

[6] The IO of the case, PW5, arrived at the CPP's office at about 4.30pm on the same day, together with the photographer ('PW2') and two other officers. In their presence, PW4 instructed the appellant to take out the clothing from the luggage bag P19. PW4 then proceeded to rip the lining layer on the left side

inside P19. This lining layer was tendered in court and was marked as P19(2). Inside P19(2) was another layer made of fabric, P19(3). Upon ripping P19(3), PW4 found an aluminum foil packet, P17(A). He made a small tear and found P17(A) to contain white crystal-like substance. He tested the crystal-like substance using a test kit and found that it tested positive for methamphetamine.

[7] PW4 then made a similar search on the right side inside the luggage bag P19. There were two similar layers lining this part of the luggage, which were subsequently marked as P19(4) and P19(5) in court. PW4 then ripped P19(5) and inside he found an aluminum foil packet as well. This aluminum foil packet was marked in court during trial as P17(B). However, PW4 did not carry out any test on the contents of P17(B) *in situ*. SP4 noted that during the search on the luggage bag P19, the appellant looked shocked and was perspiring.

[8] Thereafter, the appellant was placed under arrest and a police report was lodged by PW4 vide KLIA Report No 9079/10. The appellant and all the exhibits were then handed over to the IO of the case as evinced in P47, the *senarai barang bukti* and P48, the *borang penyerahan barang-barang kes*. Subsequently, the appellant was taken to Pejabat Kastam, Kampong Jinjang, Negeri Sembilan.

[9] It was the appellant's version that he was under the impression that he was smuggling diamonds and precious stones upon the behest of one by the name of 'Ifeanyi' in his native country, Nigeria. This 'Ifeanyi' according to the appellant had told him that the syndicate the appellant had earlier borrowed money from would waive his loan together with the interest thereon, if the appellant agreed to smuggle diamonds and precious stones into Malaysia. The appellant further averred that he had no knowledge of the drugs and maintained that if at all, he was merely an innocent carrier.

[10] Based on the above factual circumstances, the appellant was charged before the High Court sitting at Shah Alam, Selangor as per the charge in P1. It reads in the original language as follows:

> Bahawa kamu pada 26 Ogos 2010 jam lebih kurang 3.10 petang bertempat di Cawangan Pemeriksaan Penumpang 1 (CPP1) Balai Ketibaan Terminal Utama Lapangan Terbang Antarabangsa KLIA, dalam daerah Sepang, dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya sejumlah berat 1463 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[11] Based on the evidence that was adduced by the prosecution before him,

the learned trial judge was satisfied that there was a prima facie case established against the appellant on the charge P1 and he had accordingly ordered the appellant to enter on his defence to the preferred charge. He was also satisfied that the crystal-like substances contained in the aluminum foils that were retrieved from inside the bag P19 belonging to the appellant that were seized by the prosecution witnesses at KLIA were methamphetamine, a dangerous drug as listed in the First Schedule of the DDA 1952 as determined and confirmed by the chemist 'PW3' who had analysed them in her laboratory. The confirmed drugs were tendered in court as P18(A) and P18(B).

[12] In a charge for drug trafficking involving acts, for instance of transporting, carrying or keeping, importing, inter alia, under the DDA 1952, the two essential ingredients which the prosecution must establish on a prima facie level are first that the accused person has possession of the impugned substances, and that second the accused was in such possession with a view to traffic the same within the meaning as contemplated by the DDA 1952. Possession arises from the accused having either custody or control over the impugned drugs. Depending on the circumstances surrounding the factum of control or custody, possession may be established by way of affirmative evidence or, it may be presumed under s 37(d) of the DDA 1952. While the former is commonly referred to as actual possession, the latter is tagged as presumed possession. Though the word 'possession' itself has presented considerable difficulties in the past (to refer to cases), the law on possession in relation to drug offences is now rather settled and trite. In the context of the word 'possession' under s 37(d) of the DDA 1952, it was held by Ambrose J, in approving the definition given to the word attributed to Roscoe Pound, the eminent American jurist, to be as follows:

> Custody is a mere condition of fact, a mere physical control over the thing. Where custody (exercised by oneself or by another) is coupled with the mental element of holding for one's own purposes, there is possession.

[13] Again, in the context of s 37(d) of the DDA 1952, once a person is shown from the evidence adduced by the prosecution, to be in custody or control of the drugs, the two things are presumed against him. First, is that he is presumed to be in possession of the said drugs, and second, he is deemed to know the nature of such drug. Once the presumption of possession is invoked against the accused person, he has the burden of rebutting it on the balance of probabilities.

[14] With regard to trafficking in dangerous drugs, it is defined under s 2 of the DDA 1952. That definition goes on to state as follows:

> trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving,

A receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the authority of this Act or the regulations made under the Act.

B **[15]** The definition is therefore not exhaustive and the doing of any of the various acts as listed thereunder relating to dangerous drugs could be used to attach liability for trafficking in dangerous drugs. In the case of *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604 the Federal Court had occasion to say:

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> Thus, the reliance placed by the Court of Appeal on *Chow Kok Keong*, to hold that the definition section under s 2 of the Act could never be invoked to impose criminal liability, was, with respect, misplaced.

D **[16]** In this appeal before us, the undisputed facts have been that the appellant was caught in possession of the bag P19 that was subsequently found by PW4 to contain the impugned drugs, to wit, methamphetamine weighing 1,463g in all, wrapped in aluminum foils hidden behind layers of linings inside the said bag.

E

[17] On the perusal of the appeal record as well as the submissions of both parties before us, we were of the view that the learned trial judge was correct in concluding that the prosecution had established a prima facie case against the

F appellant on the charge of trafficking in the said drugs.

[18] The appellant had elected to testify under oath. His defence had been that he had no knowledge of the presence of the impugned drugs that were found within the inner layer linings inside the bag (exh 19) that he was carrying

G as his luggage and to which he had the keys to lock and unlock the same bag. Essentially, his defence was that he was merely asked by two persons who had threatened to harm him and his family in Nigeria if he refused to smuggle diamonds into Malaysia. It was his evidence in the court below that if he agreed to do their bidding, then his debts amounting to USD50,000 would be

H forgiven by the syndicate from whom he had been extended the facility. He had no knowledge of the impugned drugs that were found inside his bag P19 that were hidden in the rather elaborate manner as described by the prosecution witness, PW4.

I **[19]** Perhaps, it would be useful to see how the courts had dealt with similar situations, namely where the impugned drugs were found inside a bag in the custody of an accused person, in the past. There is no dearth of decided cases on that point. But it would, to our mind, suffice to refer to two of such cases.

[20] In the case of *Tong Peng Hong v Public Prosecutor* [1955] 1 MLJ 232 it was held:

> If something is found for example in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I can produce some satisfactory evidence to the contrary, that I know about it.

[21] In the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, it was said by Lord Wilberforce, as follows:

> In all such cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence of possession. It calls for an explanation. The explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession.

[22] In the case before the learned trial judge, the evidence surrounding the finding of the impugned drugs from inside the bag (P19) over which the appellant had control or custody had justified the trial judge's invocation of the presumption of possession under s 37(d) of the DDA 1952 against the appellant. Indeed as the evidence had unfolded, the appellant had unlocked the bag P19 in front of PW4 for inspection by way of putting the bag P19 through the scanning machine. He had the key to unlock the said bag P19. Before departing from this subject of possession, it would be apt to cite Lord Morris' speech in the *Warner* case where His Lordship had this to say:

> I cannot think that it would be rational to hold that someone who is in possession of the box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[23] We thought that would substantially address the issue raised by the appellant as to what 'Ifeanyi' had allegedly told him back in Nigeria, about the bag (P19) containing diamonds.

[24] As regards the issue of trafficking, we noted that the trial judge had alluded his mind to this at pp 214–219 of the record of appeal. He not only relied on s 2 of the DDA 1952, but he had gone beyond that by looking at the decided cases as the evidence had shown not only passive physical possession but also active transportation or carrying of the said drugs from Nigeria to Malaysia. There was also the element of concealment involved as the evidence surfaced from the ensuing investigation. He had cited in support the case of

Public Prosecutor v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146 and the case *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64. In *Ong Ah Chuan* case it was held that:

> As a matter of common sense the larger the quantity of the drugs involved, the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it ...

[25] In this present appeal before us, the amount of the drugs was 1,463g of methamphetamines. They were found hidden from view, behind the two-layered linings on both side walls inside of the bag P19 and were found out after the bag (P19) was run through the scanning machine at the Royal Customs Examination Centre at KLIA. They were found packed in two separate aluminum foils. The trial judge had heard the evidence of the prosecution witnesses and in the light of the 'put' questions by the appellant during cross-examination. The version of the appellant was thus 'put' to the witnesses, including the averment by the appellant that he was smuggling diamonds into Malaysia and the role played by one person by the name of 'George'. He had made a maximum evaluation of such evidence as led before him and he had concluded that the prosecution had succeeded in establishing a prima facie case of drug trafficking against the appellant as per the charge. He was aware of the legal embargo on the use of the double presumption on possession and trafficking. We noted that he had invoked the presumption of possession and did not invoke the presumption of trafficking against the appellant despite the amount of the drugs having exceeded the statutory threshold amount. We were all agreed that he had properly directed himself in that regard.

[26] As such, under the circumstances, we did not see any error in the trial judge's handling of the evidence and his application of the legal principles in play when he decided to call for the appellant to enter on his defence to the charge (P1) that was preferred against him.

[27] The appellant had elected to testify from the witness box and he was cross-examined by the learned deputy on his version of events in explaining the surrounding circumstances pertaining to the existence of the impugned drugs in his bag (P19) at the material time as indicated in the charge (P1).

[28] In the course of his decision, the trial judge had stated that he had preferred the testimonies of the prosecution witnesses to that of the appellant. He had found their testimonies to be credible and that he had no reason to be suspicious about them. Having so considered the overall evidence in totality before him, the learned trial judge was of the view that the appellant had failed to rebut the presumption of possession under s 37(d) of the DDA 1952 of the

impugned drugs that were found in his bag and that the appellant had also failed to raise a reasonable doubt on the factum of trafficking. He also had found that the appellant had failed to raise a reasonable doubt as to his guilt in the circumstances of the case.

[29] The penultimate findings by the learned trial judge can be found at pp 240–241 of the record of appeal. This is how he had concluded on the appreciation of the evidence as led before him:

> For all the reasons enumerated above, I am satisfied that the defence posited by the accused has not created a reasonable doubt upon the prosecution's case upon which he was called to enter his defence. The said drugs were carried into this country from Nigeria. No evidence was adduced to account for his conduct in trafficking the said drugs into Malaysia through KLIA.
>
> Equally the defence of the accused has failed on the balance of probabilities to rebut the statutory presumption invoked against him under s 37(d) of the DDA, 1952. The factum of custody and control of the luggage P19 remained intact. On the evidence adduced, the accused had equally failed to rebut the deemed possession of the said drugs and the deemed knowledge of the nature of the said drugs. The defence of the accused is a simple denial of having possession of the said drugs and having knowledge of the nature of the said drugs. Such denial is insufficient without other proof to reasonably dislodge the prosecution's case and is equally incapable of rebutting the presumption applicable against him.
>
> On the other hand, I am satisfied that the prosecution had successfully proven the offence against the accused beyond reasonable doubt. The accused is accordingly found guilty and convicted of the offence as proffered.

[30] Having found the appellant guilty, he had convicted him and he had proceeded to sentence him to death by hanging, as mandated under the law.

[31] Aggrieved by the said decision of the learned trial judge, the appellant had since lodged the required notice of appeal challenging the impugned decision of the learned trial judge. That had accounted for this appeal before us.

[32] A perusal of the petition of appeal lodged by the appellant had revealed that a number of grounds had been raised against the learned trial judge's decision. In fact, the appellant's petition of appeal that had been filed had looked as follows:

> 1. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila mensabitkan Perayu di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan menjatuhkan hukuman mati di bawah Seksyen 39B (2) Akta yang sama. Hakim Bicara Yang Bijaksana terkhilaf dari segi fakta dan undang-undang apabila membuat penemuan bahawa Pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

2. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang kerana Pihak Pendakwaan gagal membuktikan satu kes pengedaran dadah di bawah seksyen 2 ADB 1952.

3. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak merujuk kepada versi pembelaan di mana SP5 semasa pemeriksaan balas nama 'George Emmenike' disebut dan beliau dalam passenger manifest. TPR semasa pemeriksaan balas OKT tidak menyentuh dengan mendalam peranan George.

4. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila beliau gagal memberi perhatian keseluruhan keterangan OKT yang menyatakan dia beranggapan bawah barang yang dibawahnya adalah berlian dan permata lain.

5. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal menggunapakai prinsip yang diutarakan oleh Mahkamah Agong:

In our case here it is manifestly evident that the learned trial judge based the conviction solely by inference from the evidence. In this regard, the caution stated by the Supreme Court in *Choo Chang Teik v Public Prosecutor* [1991] 3 MLJ 423 should be borne in mind. The Supreme Court stated at p 481 we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant.

[33] However, during the course of the hearing of this appeal before us, learned counsel for the appellant Mr Viknesvaran had indicated to us, that although he had listed down three issues as appeared in his filed written submissions, he would nevertheless not proceed with the issue that had pertained to the chemist's evidence on the effect of apparent contradictions relating to the chemist's evidence as to when the drugs in question were homogenised for analysis. As was noted by the learned deputy, that issue was not raised in the petition of appeal as filed by the appellant. Learned counsel then reiterated to us that he would not be pursuing that issue on the chemist's evidence any further.

[34] As a result thereof, learned counsel for the appellant had proceeded to submit the following issues before us:

(a) whether the character 'George' was a real or a fictitious character; and

(b) whether the appellant's reaction of 'terkejut' was synonymous with innocence.

[35] We shall deal with issue in (a) first, namely whether 'George' was for real or was a figment of the appellant's imagination, belatedly created for a self-serving purpose. Towards that end, we are of the view that it would be opportune, at this juncture, to look at the overall defence of the appellant and how it was articulated before the learned trial judge.

[36] The issue on the existence of 'George' was contained in para 3 in the appellant's petition of appeal. The complaint was couched in the following term:

> Hakim bicara yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak merujuk kepada versi pembelaan dimana SP5 semasa pemeriksaan balas nama 'George Emmenike' disebut dan beliau dalam *passenger manifest*. TPR semasa pemeriksaan balas OKT tidak menyentuh dengan mendalam peranan George.

[37] Looking at the record of appeal, in particular, the notes of proceedings, the so-called version of the appellant was that he had put questions to the prosecution witnesses during their cross-examination that the person whom the appellant referred to as 'George' was actually one 'George Emmenike' whose name appeared in the passenger manifest of the flight on which the appellant had travelled to KLIA on the fateful day. It was contended by the appellant that the prosecution did not dwell much on this 'George' during the cross-examination of the appellant.

[38] From a perusal of his grounds of decision, the learned trial judge had alluded to this essential part of the appellant's defence at p 221 of the ROA as follows:

> It was also put to the two witnesses that the accused mentioned a person called 'George' who was with him in the same flight and that 'George' was the person tasked to follow him to ensure that the accused deliver the diamonds and precious stones to a person in Malaysia. The accused's accommodation in Swiss Inn in Malaysia was arranged by 'Ifeanyi' and that the delivery arrangement of the diamonds and precious stones in Malaysia has been arranged by 'George'.

[39] The learned trial judge then went on to appreciate that part of the appellant's version of events and came to the following conclusion:

> However, in my view such 'put' questions are not evidence of the facts stated. It merely constitutes suggestions/propositions by the defence whereby generally, the initial foundation of the defence is being formulated. The accused has to testify over the same and be subjected to the vagaries of cross-examination to determine its veracity. It is no ground to find that the accused had successfully rebutted the presumption of knowledge of the nature of the said drugs based merely upon such put questions which has yet to be testified and proven by the accused. In the final analysis such put questions could not be employed to form a basis of the accused's acquittal at the end of the prosecution's case.

[40] We were therefore of the view that there was no merit in the appellant's complaint that the learned trial judge had omitted in considering the put questions to the prosecution witnesses especially, to PW5 on the issue of 'George' having been on the same flight as him. Not only did he advert to the

issue of the put questions, he went on to evaluate the same and concluded to rule that these put questions were not evidence as such. We are of the view that he was correct in so concluding as there is legal basis for so holding.

[41] In fact, in the case of *Mirza Murtala v Public Prosecutor* [2010] 5 MLJ 616; [2010] 4 CLJ 150 it was held that 'with regard to this we are conscious of the trite principle of law that suggestions made to the prosecution's witnesses at the prosecution's stage by the defence are not evidence and remains mere suggestions'. In that case of *Mirza Murtala* references were made to the cases of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim [No 3]* [1999] 2 MLJ 1 and the case of *Emperor v Karimuddi Sheikh And Ors* AIR 1932 Cal 375.

[42] On the issue as postulated in (b) namely on the alleged conduct of the appellant at the material time, the law on this, which relates to conduct as envisaged under ss 8–9 of the Evidence Act 1950 is rather trite. We are all in agreement that the Federal Court case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 must be the case on point. In that case, the learned justice Augustine Paul FCJ had this to say:

> In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s 9. The court cannot, on its own, offer an explanation for his reaction.

[43] In this appeal before us, the learned counsel had submitted that the appellant had offered an explanation as to why he had looked shocked when drugs were found from inside the linings at the sides inside his bag exh 19 by PW5, the investigating officer. According to the appellant, he thought he was smuggling into Malaysia diamonds not drugs! That had accounted for his shocked expression. That was his explanation. Learned counsel further submitted before us that s 9 requires only an explanation from the appellant. It would then be up to the prosecution to rebut the same by calling witness or witnesses and failing which, an adverse inference under s 114(g) of the Evidence Act 1950 must be invoked against the prosecution.

[44] With respect, we were not able to agree with learned counsel on that interpretation of s 9 of the Evidence Act 1950. Granted that the appellant had given an explanation, as required under the law, for his conduct, it does not mean that the trial court must of necessity accept whatever explanation that the appellant has proffered. The court will have to consider the explanation given, in the light of the other available evidence before deciding whether to accept or reject that explanation. In this case, we noted that the learned trial judge had considered the explanation and had this to say:

When the drugs were first shown to him at the CP's office, he was surprised and shocked to see the drugs and denied any knowledge of the drugs in the said luggage. The accused testified that at all times he was led by Ifeanyi to believe that he was smuggling diamonds and precious stones to settle his debts to the syndicate. The accused maintained throughout the case that he believed that he was smuggling diamonds and precious stones and that he had informed both PW- 4 and PW- 5 that he did not know about the drugs when PW- 5 showed him the drugs.

[45] The learned trial judge went on to state:

However, apart from the accused's bare oral testimony there is no evidence (documentary) to show the nature of the business he was exactly doing back in Nigeria, no evidence to show that he was in the business of importing clothes and shoes from Indonesia, no evidence that he had suffered losses in 2009 and there is no evidence that his business was doing very badly in 2009. Equally there is no evidence to indicate that indeed he had borrowed USD30,000 from loan sharks to sustain his business. The law is trite that he who asserts must prove his assertion — see s 103 of the Evidence Act 1950.

[46] At the end of his analysis of the appellant's defence on this issue on conduct, this is how the learned trial judge had concluded on the issue of the appellant having looked shocked upon the finding of the drugs from inside his bag exh 19, at p 238 of the ROA *Jld* 3:

Sifting through the accused's own testimony, it is very apparent that there is no evidence that the accused had in fact informed both PW-4 and PW-5 that he was carrying diamonds and precious stones inside the said luggage. He merely said that he had his clothes and shoes inside the said luggage and when confronted with the said drugs, he merely said that he had no knowledge of the contents of the aluminum foil packets. This is most inconsistent with his stated position enumerated above. In such event, his expression of being shocked upon the recovery of the said drugs is no indication of his want of knowledge of the nature of the items in the said two aluminum foil packets. He knew all along and indeed had knowledge of what in fact he was carrying inside the said luggage P19, hidden within the layers lining the same.

[47] With respect, we agreed with the approach taken by the learned trial judge in dealing with this issue on conduct of the appellant at the material time in that in essence, such conduct was not consistent with one that is indicative or reflective of one's innocence. We were also of the considered view that his conclusion was supported by evidence that was led before him. The appellant had indeed been inconsistent, to say the least, on a material fact as regards the contents of his bag (P19) when at one point during inspection of the bag at the KLIA, he said the bag had contained only his clothes and shoes while at another time, he told the court that he knew he had carried diamonds inside the said bag. In the circumstance, the learned trial judge was therefore entitled to treat the appellant's explanation on being shocked, the way he did. Learned counsel

had submitted before us that on the authority of *Parlan bin Dadeh* case it was for the appellant to offer an explanation and that would suffice and that then it became incumbent on the prosecution to rebut the explanation. To our mind, while the *Parlen bin Dadeh* case interprets s 9 of the Evidence Act 1950 as requiring an explanation from the accused person, we are of the respectful view that the explanation could be subject to scrutiny by the court. It could be accepted as being credible or it could in itself be incredible, in the light of other evidence already before the court, including the evidence given by the accused person himself, even without the presence of any rebuttal evidence coming from any prosecution witness, and the court will be at liberty to attach proper weight to the explanation accordingly. In other words, the explanation offered by the accused for his conduct may be rebutted in more ways than one. It may, depending on the circumstances of the case be rebutted by the conflicting evidence emanating from the accused himself, as had happened in this case. If the situation so warrants, a rebuttal coming from the adverse party may indeed become imminently imperative. But in the circumstances of the present case, the need to call the so-called 'Lokman' by the prosecution, as was submitted by learned counsel, had been rendered unnecessary.

[48] As such, we could not see any merit in the contention advanced by learned counsel for the appellant so as to be persuaded to disturb the finding made by the learned trial judge pertaining to the 'shocked' expression on the part of the appellant.

[49] We felt that we needed to address the fifth ground that was raised in the petition of the appellant although learned counsel did not specifically submit the same before us during the course of this appeal. In the fifth ground, it was contended that it was not safe to convict an accused person based on circumstantial evidence and reliance was placed on the Supreme Court decision in the case of *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423 as an authority to support that proposition.

[50] But, having considered the written submissions placed before us, it is not difficult to understand why learned counsel for the appellant had decided against pursuing this ground any further than he should. Suffice to say, that the reliance by the appellant's counsel on the so-called excerpt attributable to learned Justice Mohd Yusof bin Mohamed SCJ in the *Choo Cheng Teik* case was ill-conceived, because the excerpt was not quoted to its intended conclusion in full. As was pointed out by the learned deputy in his able submissions, the words contained in the concluding phrase 'without some proof of element of control' was missed out, wittingly or otherwise, by learned counsel for the appellant when he quoted to us the said excerpt. Read in its complete entirety, with the inclusion of that missing phrase, there exists no doubt in our collective mind that there is nothing to be usefully added on to that excerpt, save to say

that we are in total agreement with it, in as much as we are bound by that Supreme Court's decision and which would require us to rule similarly in like factual circumstances. However, in this appeal before us, the factum of custody or control was borne out quite overwhelmingly by the evidence adduced, so as to justify the invocation of the presumption of possession under s 37(d) of the DDA 1952 which the appellant had had to rebut on the balance of probabilities. We agreed with the trial judge that the appellant had failed to do so.

[51] We had perused through the appeal records and the able submissions by both parties in this appeal. At the end of such exercise, we were of the unanimous view that the learned trial judge had not misdirected himself both on the facts and his application of legal principles to those facts as found by him.

[52] Premised on the above, in the upshot, we were of the view that the learned trial judge of the High Court had not committed any error in coming to his decision in convicting the appellant on the evidence as adduced before him that would otherwise have required our appellate intervention. We therefore had found it safe to affirm the appellant's conviction on the said charge (P1). We also affirmed the sentence that was imposed on the appellant. We had therefore dismissed this appeal.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum